In the Supreme Court of the United States

OCTOBER TERM, 1975

ESTATE OF RAYMOND J. RYAN and HELEN RYAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

M. CARR FERGUSON,
Assistant Attorney General,

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the United States Tax Court (Pet. App. 29a-44a) is reported at 67 T.C. 212. The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 568 F.2d 531.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1977. On February 27, 1978, the

court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 25a). By order dated March 20, 1978, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 21, 1978 (Pet. App. 26a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tax Court's finding petitioners in contempt for refusal to answer pre-trial interrogatories of the Commissioner of Internal Revenue is barred by this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41.

2. Whether the court of appeals correctly held that petitioners were not entitled to a hearing in the district court on the government's application for an order granting them use immunity from prosecution for testimony that they might be required to give in the Tax Court.

STATEMENT

In September 1969, petitioners [1] filed a petition in the Tax Court for a redetermination of deficiencies in income taxes determined by the Commissioner for 1958-1962, 1964 and 1965. During the next several years, the Commissioner atttempted to obtain infor-

[1] After oral argument in the court of appeals, petitioner Raymond J. Ryan died; his estate has been substituted (Pet. App. 7a-8a).

mation from Swiss bank officials concerning petitioners' transactions (Pet. App. 3a).

In 1972, while the Commissioner was still seeking information from the Swiss officials, petitioners filed a motion to suppress and enjoin all proceedings, alleging, *inter alia*, that they had been the subject of illegal electronic surveillance. At a hearing held on November 16, 1972, the Tax Court sought to define the issues raised in petitioners' motion and to determine what facts, if proved, would require suppression of evidence at trial. Before the Tax Court had completed disposition of the motion, petitioners moved to suspend the hearing on their motion to suppress until trial, apparently under the assumption that the trial would be held early in 1974. The Tax Court granted this postponement (Pet. App. 3a-4a).

On January 1, 1974, the Tax Court's new Rules became effective. These rules provide for discovery, including by interrogatories, similar to the Federal Rules of Civil Procedure. Accordingly, the Commissioner served seven interrogatories upon petitioners, seeking information concerning petitioners' relationship with the Commercial Credit Bank of Zurich or with Carl W. Hirschmann. Petitioners objected to the interrogatories on the ground that their compelled answers would violate their privilege against self-incrimination. The Tax Court rejected petitioners' claim and granted the Commissioner's motion to compel their answers. Petitioners' appeal from that order was dismissed for lack of jurisdiction on the ground that the Tax Court's order was not a final order (Pet. App. 4a-5a; 517 F.2d 13).

During this time, the United States Attorney for the District of Columbia obtained an order of the district court granting petitioners use immunity in exchange for their testimony in the Tax Court, pursuant to 18 U.S.C. 6002 and 6003. Petitioners' appeal was dismissed by the court of appeals on the ground that the district court's order granting immunity was not a final order (Pet. App. 5a-6a; 538 F.2d 435).

On remand, petitioners continued to refuse to answer the Commissioner's interrogatories. After a hearing, the Tax Court held petitioners in contempt and fined petitioner Raymond J. Ryan $1,000. It rejected petitioners' Fifth Amendment claims because they had not established a reasonable apprehension that they would be prosecuted for any crime connected to the information sought in the interrogatories. Specifically, the Tax Court observed that the questions in the interrogatories were innocuous, that no criminal prosecutions were pending against petitioners, and that the statute of limitations had expired for any prosecutions in the years referred to in the interrogatories (1958-1965). Finally, the Tax Court held that petitioners' allegations of illegal electronic surveillance were premature and should be raised in petitioners' motion to suppress, which was scheduled for hearing at the time of trial (Pet. App. 6a-7a, 34a-40a).

The court of appeals affirmed (Pet. App. 2a-24a). As it observed, "we need not reach the merits of the claims of illegal governmental conduct if * * * [the Tax Court's] decision to defer ruling on these issues

was correct. The question is one of timing" (Pet. App. 9a). Since the Tax Court had postponed the evidentiary hearing until trial at petitioners' request, the court of appeals viewed their refusal to answer the Commissioner's interrogatories as an interference with the orderly procedure established by the Tax Court (*ibid.*). At all events, the court concluded that petitioner could not refuse to answer the interrogatories because their answers could not be used against them unless they were independently determined to be admissible (Pet. App. 10a).

The court of appeals also rejected petitioners' claim that the immunity statute (18 U.S.C. 6001-6003) requires that the witness be notified of a prospective grant of immunity and be given a hearing. The court concluded that the immunity statute delegates the authority to obtain an immunity grant solely to the Department of Justice and the district court may not review that determination. The district court's only role is to insure that a request for immunity complies with the procedural requirements of the statute (Pet. App. 13a).

ARGUMENT

1. The court of appeals correctly held that petitioners were required to answer the Commissioner's interrogatories and that their refusal to comply justified the Tax Court's finding them in contempt.

Although petitioners raised a multiplicity of objections to the interrogatories in the courts below,[2] their only claim before this Court is that the interrogatories were based upon illegal governmental electronic surveillance and that the Tax Court's finding of contempt is barred by this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41. There, the Court held that 18 U.S.C. 2515 gives a witness a right to refuse to answer questions before a grand jury if those questions are the product of an illegal interception of his conversations conducted without court authorization. That statute provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding * * * if the disclosure of that information would be in violation of this chapter."

In *Gelbard*, the witnesses were held in contempt for disobeying court orders by refusing to testify before grand juries. They were not given an opportunity to challenge the legality of the wire interceptions. Thus, in addressing the witnesses' contention that 18 U.S.C. 2515 afforded them a defense to the contempt charges, the Court made two assumptions: (1) that the testimony the government sought would be "evidence derived" from the intercepted communications within

[2] These claims included, *inter alia*, that answering the interrogatories would violate petitioners' Fifth Amendment and marital privileges.

the meaning of Section 2515; and (2) that the communications were not intercepted in accordance with the conditions specified in 18 U.S.C. 2516, 2518(1)-(8). *Gelbard* held that in those circumstances Section 2515 prohibits the compelling of grand jury testimony by the witnesses (see 408 U.S. at 47).

But petitioners have not yet shown that their answers to the interrogatories would be "evidence derived" from intercepted communications within the meaning of Section 2515. Thus, an essential premise of *Gelbard* is absent here. The court of appeals therefore correctly characterized their claim as premature (see Pet. App. 7a).

This is not to say that petitioners will never have an opportunity to make a showing that the Commissioner's interrogatories are the product of illegal electronic surveillance. Contrary to the facts of *Gelbard*, where the witnesses were not given an opportunity to challenge the legality of the interceptions and were held in contempt for their refusal to testify, the Tax Court here established an orderly procedure for determining the question of the legality of the surveillance at a hearing on petitioners' motion to suppress to be held at the time of trial. Indeed, that hearing was to be held in late 1973 but was postponed at petitioners' request until trial (see Pet. App. 4a). At no time did petitioners request that the evidentiary hearing on their motion to suppress be held before their answers to the interrogatories were due (see Pet. App. 9a). They cannot therefore be heard to complain about the procedure established by the Tax

Court. Since petitioners will have a full opportunity to seek to suppress their answers to the Commissioner's interrogatories, their situation is not comparable to that of the witnesses in *Gelbard*.[3]

Moreover, unlike the witnesses in *Gelbard* whose testimony would have been "received in evidence in * * * [a] proceeding * * * before * * * [the] grand jury * * *" within the meaning of Section 2515, the court of appeals made it clear that petitioners' answers to the Commissioner's interrogatories would not be used as evidence for or against them unless they were independently determined to be admissible (see Pet. App. 9a-10a). In this respect, Rule 70(d) of the Tax Court's Rules provides that " * * * answers or information or responses [to interrogatories] will not be considered as evidence until offered and received as evidence." Thus, if petitioners can demonstrate at the evidentiary hearing to be held on their motion to suppress that the interrogatories were based upon illegal electronic surveillance, their answers and any information derived from those answers would be excluded from evidence under Section 2515. Since petitioners will be fully protected from the Commis-

[3] Petitioners further argue (Pet. 7) that the Commissioner did not follow the procedures required by 18 U.S.C. 3504 because he has not affirmed or denied the illegal surveillance they allege to have occurred. But this statute does not provide an independent basis for petitioners' refusal to answer the interrogatories. At the hearing to be held on petitioners' motion to suppress, the Commissioner will comply with all of the prescribed statutory procedures in connection with a claim of unlawful electronic surveillance.

sioner's use of information derived from illegal governmental activity (if any), *Gelbard* does not support their refusal to answer the interrogatories. In these circumstances, the decision below correctly upheld the Tax Court's finding of contempt.

2. Petitioners further argue (Pet. 8-10) that they were entitled to advance notice and a hearing in the district court on the government's application for immunity from prosecution for their testimony in the Tax Court. But, as petitioners acknowledge (Pet. 8), the immunity statute (18 U.S.C. 6003) does not require that the witness be notified of or given a hearing with respect to a prospective grant of immunity.[4] As the court of appeals observed (Pet. App. 13a), the immunity statute delegates the authority to obtain a grant of immunity solely to the Department of Justice and the district court may not review its decision whether to seek immunity.

Contrary to petitioners' suggestion (Pet. 9), the court of appeals did not characterize the district court's role as that of a "rubber stamp." Rather, the court properly noted that in considering an immunity application, the district court "may only scrutinize the

[4] *In re Bart*, 304 F.2d 631 (C.A.D.C.), upon which petitioners rely (Pet. 8 n. 9), does not support their claim to a hearing. That case arose under the prior immunity statute (18 U.S.C. (1964 ed.) 3486) which was applicable only to a proceeding involving "interference with or endangering of * * * the national security or defense * * *." Thus, the court held that the government was required to persuade the court that national security or defense was involved (*id.* at 637). The present immunity statute (18 U.S.C. 6003) contains no such limitation.

record to ascertain that a request for immunity complies with the procedural and jurisdictional requirements of the statute" (Pet. App. 13a). Accord: *United States* v. *Hollinger*, 553 F.2d 535, 548 (C.A. 7); *In re Daly*, 549 F.2d 469, 479 (C.A. 7); *United States* v. *Leyva*, 513 F.2d 774, 776 (C.A. 5); *In re Kilgo*, 484 F.2d 1215, 1221 (C.A. 4); *United States* v. *Handler*, 476 F.2d 709, 714 (C.A. 2).

Given the district court's limited function on an application for immunity, there is no need for the full-blown adversary hearing petitioners seek. While petitioners contend (Pet. 9) that the Due Process Clause requires such a hearing, the cases upon which they rely are distinguishable. Those decisions all involved the taking of property without notice or a hearing. See, *e.g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601; *Fuentes* v. *Shevin*, 407 U.S. 67; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337. Here, however, the grant of immunity is coextensive with the scope of petitioners' privilege against compulsory self-incrimination (*Kastigar* v. *United States*, 406 U.S. 441) and does not involve the taking of a property or liberty interest that would require notice and hearing. The due process decisions are therefore inapplicable. As the court of appeals correctly concluded, "an immunity order is effectively an exchange of one safeguard for another" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

M. CARR FERGUSON,
Assistant Attorney General.

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys.

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